(2)

No. 91-990

In The

Supreme Court of the United States

October Term, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,

Petitioners,

versus

WILLIAM P. HOBBY JR.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When the sole object of a suit is to recover money damages, is a plaintiff who recovers only one dollar as nominal damages a "prevailing party" within the meaning of 42 U.S.C. § 1988 and this Court's decision in *Garland*?*

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* *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989).

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STATEMENT OF THE CASE

In June 1975, Joseph Davis Farrar brought this civil rights action for money damages and injunctive relief under 42 U.S.C. §§ 1983 and 1985. Named as defendants were respondent, William P. Hobby Jr., then the lieutenant governor of Texas, two elected officials of Liberty County, Texas, and three state employees. Farrar charged the defendants with engaging in various conspiracies designed to deprive him illegally of his ownership and operation of Artesia Hall, a facility for minors suffering from drug-related, academic, and disciplinary problems. Later amendments added Dale Lawson Farrar, Joseph Farrar's son and an employee at Artesia Hall, as plaintiff, dropped the demand for injunctive relief, and requested as relief $2.7 million in monetary damages only. Joseph Farrar died in 1983 and Petitioners, the co-administrators of his estate, were substituted as plaintiffs. A third and final amended complaint continued to request only monetary damages but raised that request to $17 million.

During twenty-five days of trial beginning in August 1983, the jury heard evidence regarding the sexual abuse of children and other details of the gruesome conditions at Artesia Hall that lead to its closing. In June 1973, following Joseph Farrar's indictment for the murder of an Artesia Hall student, the Texas attorney general had obtained a temporary restraining order in state district court to close the facility. The evidence at trial, and the jury's findings, reflected that Hobby had played a very minor role in the state's action.

The jury found, among other things, that all of the defendants *except* Hobby engaged in a conspiracy against

one or more of the plaintiffs; that this conspiracy was *not* the proximate cause of any damages to the Farrars; that Hobby "committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States and the State of Texas"; but that the act or acts of Hobby were *not* a proximate cause of any damages to Joseph Farrar. (App. A-1 to A-4). Based upon these answers, the district court ordered "that Plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs." (App. A-5 to A-6).

A panel of the Fifth Circuit affirmed the judgment in part, but held that the district court had erred in refusing to award Joseph Farrar nominal damages of one dollar, based upon the jury's one finding of some unspecified violation of his constitutional rights.[1] The case was remanded to the district court for further proceedings.[2] The Farrars then applied for attorneys' fees and expenses under 42 U.S.C. § 1988; and the court, after a hearing, granted the full amount of the Farrars' request, awarding a total of $317,662 in attorneys' fees and expenses, plus interest, against Hobby and nothing against the other defendants.

The Fifth Circuit reversed the award. Relying on this Court's decisions in *Texas State Teachers Association v. Garland Independent School District*,[3] *Rhodes v. Stewart*,[4] and

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[1] *Farrar v. Cain*, 756 F.2d 1148, 1152 (5th Cir. 1985).

[2] *Id.* at 1152-53.

[3] 489 U.S. 782 (1989).

[4] 488 U.S. 1 (1988).

Hewitt v. Helms,[5] the court concluded that the Farrars were not "prevailing parties" within the meaning of 42 U.S.C. § 1988:

> The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. "That is not the stuff of which legal victories are made." Of course, as the district court emphasized, the Farrars did succeed in securing a jury-finding that Hobby violated their civil rights[6] and a nominal award of one dollar. However, this finding did not in any meaningful sense "change the legal relationship" between the Farrars and Hobby. Nor was the result a success for the Farrars on a "significant issue that achieve[d] some of the benefit the [Farrars] sought in bringing suit." When the sole relief sought is money damages, we fail to see how a party "prevails" by winning one dollar out of the $17 million requested. Furthermore, even if the Farrars could be seen as victors, given their singular objective of money damages, surely theirs was "a technical victory . . . so insignificant, and . . . so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status."

Estate of Farrar v. Cain, 941 F.2d 1311, 1315 (5th Cir. 1991) (footnotes omitted).

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[5] 482 U.S. 755 (1987).

[6] In fact, only Joseph Farrar obtained a favorable jury finding; Dale Farrar got none. (App. at A-7).

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision is correct. Under the guidelines of this Court, the Farrars are not "prevailing parties" because their lawsuit failed to alter materially the legal relationship between them and Hobby. Nor was Joseph Farrar's recovery of one dollar as nominal damages, in a suit in which the plaintiffs' sole objective was monetary relief, a "significant" victory. The outcome of the action was a classic technical or *de minimis* "victory" for Joseph Farrar alone and, therefore, cannot support an award under 42 U.S.C. § 1988.

ARGUMENT

In *Garland*, this Court unanimously adopted the First Circuit's test for identifying whether a civil rights plaintiff is a prevailing party within the meaning of § 1988: "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind."[7] To satisfy this inquiry, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."[8] Whether a *material alteration* of that legal relationship has occurred is the

[7] 489 U.S. 782, 791-92 (1989) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

[8] *Id.* at 792 (citing *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987), and *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988)).

"touchstone" of the inquiry that must be made.[9] Accordingly, the inquiry here is whether Joseph Farrar's recovery of one dollar in nominal damages constitutes a "material alteration" of both plaintiffs' "legal relationship" with Hobby.

The Fifth Circuit correctly decided that the Farrars' recovery did not meet this test. By definition, theirs was the classic symbolic victory, one working only a "nominal" alteration in the legal relationship: the result of the lawsuit is that Hobby owes Joseph Farrar one dollar. To maintain that a "nominal" debt of one dollar constitutes a "material alteration" in the legal relationship between these litigants requires great imagination. If left to stand, the district court's award in this case would have accomplished a curious result: "nominal" becomes synonymous with "material."

Moreover, an award of attorneys' fees to the Farrars would violate the second aspect of this Court's holding in *Garland*:

> [A] technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status. . . . Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the "generous formulation" we adopt today has not been satisfied.

489 U.S. at 792.

[9] *Id.* at 792-93.

That constitutional rights are indeed priceless in no way detracts from the truth that even these rights may sometimes be only technically infringed – infringed in degrees that justify only technical or symbolic redress. The Court's own example, given in *Garland*, is definitive of this case:

> For example, in the context of this litigation, the District Court found that the requirement that non-school hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague. The District Court characterized this issue as "of minor significance" and noted that there was "no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours." If this had been petitioners' only success in the litigation, we think it clear that this alone would not have rendered them "prevailing parties" within the meaning of § 1988.

Id. (citations omitted).

Here is a finding that a regulation governing the conduct of the plaintiffs is unconstitutional and thus of no effect, so that they are free of its strictness. Can it be doubted that this is a "victory" of greater significance than the recovery of an amount of damages adequate to do little more than purchase a copy of the morning paper? Yet the Court offers it as a "clear" example of the sort of technical or symbolic victory that does not suffice for "prevailing party" status under § 1988.

To describe the outcome of this lawsuit as even a "technical victory" for the Farrars would be overly generous. At most, it is an insignificant, symbolic victory that

cannot support an award of attorneys' fees under § 1988. The Farrars obtained no injunctive, declaratory, or other relief that resulted in any material alteration of their long-past and fleeting legal relationship with Hobby. That is, the outcome of the lawsuit did not require Hobby to alter his behavior toward the Farrars.

The Farrars wanted just one thing: $17 million in damages. They got one dollar.[10] A better example than this case of a *de minimis* or "technical" victory can hardly be imagined, since an award of nominal damages is the classic reflection of a mere symbolic success. The First Circuit has observed: "Nominal damages are a mere token, signifying that the plaintiff's rights were *technically* invaded even though he suffered, or could prove, no loss or damage. . . ."[11] That is precisely the language that this Court used in *Garland* to describe *de minimis* victories within the meaning of § 1988 – victories that do not activate the First Circuit's formula for a fee award.

Petitioners suggest that the Fifth Circuit's holding conflicts with this Court's decision in *City of Riverside v. Rivera*.[12] They criticize the opinion below for failing to "discuss or cite" *Rivera*. Petitioners' assertion is incorrect and their criticism is misplaced.

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[10] In fact, the district court never signed a judgment against Hobby for the one dollar. Voting with their feet, petitioners and their lawyers concur in the view that their recovery is too insignificant to bother collecting.

[11] *Magnett v. Pelletier*, 488 F.2d 33, 35 (1st Cir. 1973) (emphasis added).

[12] 477 U.S. 561 (1986).

Rivera presented the narrow issue "whether an award of attorney's fees under 42 U.S.C. § 1988 is *per se* 'unreasonable' within the meaning of the statute if it exceeds the amount of damages recovered by the plaintiff in the underlying civil rights action."[13] *Rivera*, therefore, was concerned with the proper *amount* of a fee award, not the plaintiff's entitlement to any award at all. In a plurality opinion, this Court "reject[ed] the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers."[14]

The issue resolved by the judgment in *Rivera* is distinct from the issue presented here. The Fifth Circuit concluded in this case that the Farrars failed to cross "the threshold to a fee award of some kind."[15] The Fifth Circuit did *not* base its holding on the amount of the fees awarded.[16] Rather, the Fifth Circuit reached only the question of the right to any fee *at all*:

> [W]e hold that when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988. This was no struggle over constitutional principles. It was a

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[13] *Id.* at 564.

[14] *Id.* at 574 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

[15] 941 F.2d at 1313 (quoting *Garland*, 489 U.S. at 792).

[16] Although when compared to the result that the Farrars obtained, the district court's award of $317,662 in fees and expenses was hardly "reasonable." *See Garland*, 489 U.S. at 790 ("[T]he *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee. . . . ").

> damage suit and surely so since plaintiffs sought nothing more. We must – under *Garland*, *Hewitt*, and *Rhodes* – inquire into whether the plaintiff's victory, as measured by the relief actually obtained, was merely a *de minimis* or technical success.

941 F.2d at 1315-16 (footnotes omitted).

Thus, as this Court's holding required it to do, the Fifth Circuit evaluated the amount of the Farrars' "success" (one dollar) against the relief that they sought ($17 million). Although perhaps tempted to do so, the Fifth Circuit did not justify its holding on the basis that the fee award was disproportionate to the amount of damages recovered. *Rivera*, therefore, has no application here.

Petitioners emphasize the apparent conflict between the Fifth Circuit's holding and the decisions of six other circuits, as the Fifth Circuit opinion addressed in passing.[17] Petitioners include another Circuit in this list, the Fourth. Closer scrutiny, however, reveals that the only case plainly in conflict with the Fifth Circuit is the Second Circuit's decision in *Ruggiero v. Krzeminski*.[18] The critical distinction is that each of these cases, with the exception of *Ruggiero*, was decided before *Garland*.

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[17] 941 F.2d at 1316 ("Our holding today conflicts with opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.") (citing *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991); *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir. 1988); *Coleman v. Turner*, 838 F.2d 1004, 1005 (8th Cir. 1988); *Nephew v. City of Aurora*, 830 F.2d 1547, 1553 n.2 (10th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 976 (1988); and *Garner v. Wal-Mart Stores*, 807 F.2d 1536, 1539 (11th Cir. 1987).

[18] 928 F.2d 558 (2d Cir. 1991).

For example, before *Garland*, the Fourth Circuit had concluded: "The fact that plaintiff may prevail on the merits yet, under *Carey*, recover only nominal damages shall in no way diminish his eligibility for attorney's fees under § 1988. . . . "[19] After *Garland*, however, the Fourth Circuit thought better of this view, recognizing that a judgment for nominal damages only may be just the "rare case" that this Court envisioned when describing the type of technical or *de minimis* victory that will not support an attorneys' fee award.[20]

In *Garland*, this Court overruled the Fifth Circuit's "central issue" test for prevailing party status but in the same breath made plain that "prevailing party" status for § 1988 purposes requires success on at least *some* "significant issue . . . which achieves some of the benefit the parties sought in bringing the suit."[21] The "benefit" the Farrars sought did not include one dollar nominal damages; therefore, the Fifth Circuit's holding in this case is the only result that is consistent with *Garland*.

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[19] *Burt v. Abel*, 585 F.2d 613, 617-18 (4th Cir. 1978).

[20] *Spencer v. General Electric Co.*, 894 F.2d 651, 662 (4th Cir. 1990) (citing *Garland*, 489 U.S. at 792).

[21] 489 U.S. at 782 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1988)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 1992

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR, ET AL	§	CA NO.
VS.	§	75-H-987
CLARENCE D. CAIN, ET AL	§	

SPECIAL INTERROGATORIES TO THE JURY

1. Do you find from a preponderance of the evidence that one or more of the defendants are entitled to either judicial or prosecutorial immunity as defined in the Court's charge?

Defendant Cain	Yes ___	No X
Defendant Hartel	Yes ___	No X
Defendant Gruver	Yes ___	No X
Defendant Urmy	Yes ___	No X

2. Do you find from a preponderance of the evidence that one or more of the defendants are entitled to qualified immunity as defined in the Court's charge?

Defendant Cain	Yes ___	No X
Defendant Hobby	Yes ___	No X
Defendant Hartel	Yes ___	No X
Defendant Gruver	Yes ___	No X
Defendant Urmy	Yes ___	No X

3. Do you find from a preponderance of the evidence that any of the defendants engaged in a conspiracy against one or more of the plaintiffs as defined in the charge?

Defendant Cain	Yes X	No ___
Defendant Hobby	Yes ___	No X
Defendant Hartel	Yes X	No ___
Defendant Gruver	Yes X	No ___
Defendant Urmy	Yes X	No ___

4. If you have answered Interrogatory No. 3 "Yes" as to any defendant, and only in that event, then answer:

Do you find from a preponderance of the evidence that such conspiracy was a proximate cause of any damages to the plaintiffs?

Yes ___ No X

5. If you have answered Interrogatory No. 4 "Yes" and only in that event, then state the amount of damages, if any, found by you from a preponderance of the evidence as to each plaintiff proximately caused by such conspiracy, if any.

J.D. Farrar	$N/A
Dale Lawson Farrar	$N/A

6. If you answered "yes" to any Defendant in Interrogatory No. 4 and you find from a preponderance of the evidence that the act or acts were committed intentionally, maliciously, recklessly or in callous disregard of the civil rights of one or both of the Plaintiffs then state the amount of damages, if any, you find will punish the

Defendant or Defendants and serve as a deterrent to prevent others from engaging in similar acts.

J.D. Farrar	$N/A
Dale Lawson Farrar	$N/A

If you have answered Interrogatory No. 3 "no" as to the Defendant Hobby then answer interrogatory No. 7.

7. Do you find from a preponderance of the evidence, that Defendant Hobby committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States and the State of Texas?

Yes X

No ___

8. If you answered Interrogatory No. 7 "Yes" and only in that event, then answer:

Do you find from a preponderance of the evidence that such act or acts were a proximate cause of any damages to Plaintiff Joseph Davis Farrar?

Yes ___

No X

9. If you answered Interrogatory No. 8 "Yes" and only in that event, then state the amount of damages, if any, found by you from a preponderance of the evidence that caused Joseph David Farrar damages as a result of Defendant Hobby's act or acts.

$N/A

10. If you answered "Yes" to Interrogatory No. 8 and you find from a preponderance of the evidence that the

act or acts were committed intentionally, maliciously, recklessly or in callous disregard of the civil rights of Plaintiff Joseph Davis Farrar then state the amount of damages, if any, you find will punish Defendant Hobby and serve as a deterrent to prevent others from engaging in similar act or acts.

$N/A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR AND DALE LAWSON FARRAR	§	
VS.	§	CIVIL ACTION NO.
CLARENCE C. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., RAYMOND W. VOWELL, LONNIE A. GRUVER and ARTHUR J. HARTELL, III	§	75-H-987

JUDGMENT

This matter having come on for trial, and the jury having duly rendered its verdict and having found as follows:

a) that none of the Defendants Cain, Hartel, Gruver or Urmy were entitled to judicial or prosecutorial immunity;

b) that none of the defendants Cain, Hobby, Hartel, Gruver or Urmy were entitled to qualified immunity;

c) that the Defendants Cain, Hartel, Gruver and Urmy engaged in a conspiracy against one or more of the Plaintiffs to deprive them of their civil rights;

d) that said conspiracy was not the proximate cause of any damage to Plaintiffs;

e) that Defendant Hobby committed an act or acts under color of state law that deprived

Plaintiff Joseph D. Farrar of a civil right guaranteed by the Constitution and laws of the United States and State of Texas; and

f) that such act(s) committed by Defendant Hobby was or were not the proximate cause of any damage to Plaintiff Joseph D. Farrar.

It is ORDERED, ADJUDGED and DECREED, that that [sic] Plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs.

Signed this 10th day of November, 1983.

ROBERT O'CONOR, JR.
United States District Judge